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4. ARBITRATION

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4.1 Despite the COVID-19 pandemic, the international arbitration scene in 2020 continued to grow and the Singapore courts saw more arbitration-related cases than ever. The vast majority concerned applications to set aside awards under the International Arbitration Act[1] ("IAA"), with Singapore being the seat of the arbitration. There were three applications related to the stay of court proceedings and one application for an anti-suit injunction in favour of arbitration. One application concerned an appeal under the Arbitration Act[2] ("AA"), and another interesting decision was an application for declaratory relief concerning the obligation of confidentiality in international investment treaty arbitration. The judicial attitude of the Singapore courts continues to be pro-arbitration, with repeated emphasis on minimal curial intervention and the high threshold required to set aside or refuse enforcement of an award. Nevertheless, in 2020, the Singapore courts set aside one award, set aside in part another award, and remitted an issue in yet another award back to the tribunal for consideration, demonstrating that Singapore courts were not afraid to intervene in the right circumstances.

I. Stay of court proceedings

A. Case management stay

4.2 The court's power to order a stay of proceedings in international cases involving arbitration clauses is statutorily enshrined in s 6 of the IAA, which mandates the court to stay the proceedings on the condition that "the proceedings relate to [a matter which is the subject of the

1 Cap 143A, 2002 Rev Ed.
2 Cap 10, 2002 Rev Ed.

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agreement], unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed".

4.3 Additionally, the court can, in its discretion, grant a stay in favour of arbitration on the basis of the court's "effective case management power" in the fair and efficient administration of justice. This approach was first adopted by the Court of Appeal case in *Tomolugen Holdings Ltd v Silica Investors Ltd*[3] ("*Tomolugen*"), which spawned similar applications seeking a stay of proceedings, as evidenced by many decisions in the years following.

4.4 In *PUBG Corp v Garena International I Pte Ltd*,[4] the appellant, PUBG Corp, commenced court proceedings alleging the infringement of its intellectual property rights. These proceedings were subsequently suspended, and parties allegedly came to a settlement agreement ("SA"). The respondent contended there was a valid SA and commenced arbitration under the arbitration agreement in the SA to determine the validity of the SA and whether it had been breached. The respondent therefore applied for a case management stay of the court proceedings pending the resolution of the issues on arbitration. The High Court granted the stay subject to a six-month time limit, which decision was appealed.

4.5 The Court of Appeal, in dismissing the appeal, affirmed their decision in *Tomolugen* and emphasised that the grant of a stay of proceedings on case management grounds was a discretionary power, taking into consideration the unique factual matrix of each case. Specifically, the grant of a case management stay of court proceedings, where a related arbitration was ongoing, was a balance between three imperatives: (a) preserving the plaintiff's right to choose whom to sue and where; (b) upholding the agreement to arbitrate; and (c) preventing abuse of process. Additionally, where related issues involving some or all of the same parties were also subject to an arbitration agreement, such discretion had to be exercised with due sensitivity and regard to the facts, particularly the nature of the overlapping issues.

4.6 The Court of Appeal took the view that the appropriate forum to resolve the validity of the settlement would be the arbitral tribunal as a court, when presented with what appears on its face to be a valid arbitration agreement and a dispute that appears to fall within the scope of that agreement, is bound *not* to ignore that agreement. Instead, it should allow any such dispute to be determined by the arbitral tribunal,

3 [2016] 1 SLR 373.
4 [2020] 2 SLR 379.

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given the principles of judicial non-intervention in arbitral proceedings and *kompetenz-kompetenz*. This analysis is not affected by the fact that this case concerned a case management stay rather than a mandatory stay under s 6 of the IAA.

4.7 The Court of Appeal also found that while, superficially, the disputes concern distinct issues (*viz*, the proceedings in court did not concern the settlement and the arbitration did not concern the infringement claims), the existence or otherwise of a valid settlement must be resolved first. If there was indeed a valid settlement agreement, this would have the effect of compromising the underlying claims and the proceedings would thereby be unnecessary. If there was no valid settlement, only then would court proceedings continue.

4.8 This decision reaffirms the Singapore court's consistent stance that where there is *prima facie* an arbitration agreement, whether the same stands or falls should first be determined by the tribunal. Notably, the Court of Appeal made clear that where an arbitration agreement came into existence after the commencement of court proceedings (even if its validity was disputed), the court would not strictly be exercising the power to stay under s 6 of the IAA (where the action is commenced in the face of a pre-existing arbitration agreement) but could exercise its inherent case management powers to grant a stay.

4.9 *Carlsberg Breweries A/S v CSAPL (Singapore) Holdings Pte Ltd*[5] likewise concerned an application for a stay under the court's inherent case management powers. The plaintiff commenced the suit seeking repayment of a loan made under an amended loan agreement with the defendant. The amended loan agreement was interconnected with, *inter alia*, an amended shareholders' agreement containing an arbitration clause and a deed of undertaking. The plaintiff demanded repayment from the defendant's alleged breaches of cll 2(a) and 2(c) of the deed of undertaking, some of which were allegedly constituted by breaches of the amended shareholders' agreement. Consequently, the defendant applied for the suit to be stayed in its entirety, pending the outcome of an ongoing Singapore International Arbitration Centre ("SIAC") arbitration between them. Both parties agreed that the part of the plaintiff's claim which proceeded on the basis of a breach of cl 2(a) of the deed of undertaking, and which in turn depended upon alleged breaches of the amended shareholders' agreement, should be stayed. However, the plaintiff argued that its claim in respect of a breach of cl 2(c) of the deed of undertaking ought to proceed, as the cl 2(c) issues were independent of any alleged breach of the amended shareholders' agreement.

5 [2020] 4 SLR 35.

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4.10 The SICC ordered a partial stay for all matters except the cl 2(c) issues. Jeremy Lionel Cooke IJ found that, in the absence of an agreement that the cl 2(c) issues be referred to arbitration, the court's position was that unless there was good reason to consider that the arbitrators' findings would be determinative of the cl 2(c) issues, there could be *no* good reason for a stay. The court held that the interests of justice would be best served by the court dealing with the cl 2(c) issues expeditiously, which would have the possibility of considerable savings in time and costs. This stemmed from the court's finding that the cl 2(c) issues were discrete and capable of determination by the court, and that there was a likelihood that the cl 2(c) issues could be disposed of earlier as compared to protracted arbitration proceedings. In its view, the cl 2(c) issues had the potential to be determinative of the entire dispute and would probably have to be determined in the court at some stage, and it therefore made sense for them to be dealt with as expeditiously as possible rather than for the suit to be wholly stayed pending the outcome of the arbitration.

4.11 While this decision appears on its face to track the principle set out in earlier decisions that a case management stay is discretionary, the court nevertheless carved out the cl 2(c) issues on the basis that it did not arise out of the amended shareholders' agreement. Although it accepted that there was interconnection in the parties' legal relationships and dealings, the court nevertheless felt that a determination on cl 2(c) could be decided in a shorter time than the "protracted arbitration". It is unclear how the court came to its view that the cl 2(c) issues could be determinative of the entire dispute and how the judge thought the arbitration would be "protracted".

B. Conflicting dispute resolution clauses

4.12 Parties may occasionally enter into contractual arrangements with clumsily drafted provisions such as the same contract providing for a choice of jurisdiction and an arbitration clause, or related contracts between related parties containing arbitration clauses providing for different seats of arbitration. As such, it is not unusual for such cut-and-paste policies to give rise to issues of conflicting intentions. Such drafting is ill-advised and should be avoided to save parties the need to seek court intervention.

4.13 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd*[6] ("*Silverlink*") is one such case, combining the old concept of *Scott v Avery* clauses ("no legal action before arbitration") with the more modern

6 [2021] 3 SLR 1422.

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practice of multi-tiered dispute resolution clauses. In *Silverlink*, the plaintiff, the ultimate holding company of the Aman Group, was one of the insured parties under an Industrial All Risks Policy ("the Policy") issued by the defendant. Due to the COVID-19 pandemic, the hotels in Phuket were ordered to close. One of the Silverlink hotels had to be closed as a result. Silverlink made a claim under the Policy based on the hotel closure order and the closure of the Phuket International Airport. The defendant insurer rejected the claim. The plaintiff hence commenced an action seeking a declaration that it had a valid claim under the Policy. In response, the defendant applied to stay the proceedings in favour of arbitration. The general conditions of the Policy included one which provided for mediation, arbitration as well as the jurisdiction of the courts in Singapore:[7]

> Clause 11 (the 'Arbitration Clause') was expressed to apply to 'any dispute arising out of or in connection with' the Policy which was not settled pursuant to cl 10 (the 'Mediation Clause'). Clause 13 (the 'Jurisdiction Clause') was expressed to apply to 'any dispute … regarding the interpretation or the application of' the Policy.

Additionally, the insurance renewal certificate provided that any dispute regarding interpretation of the Policy was subject to the jurisdiction of the Singapore courts. On the face of the provisions, there was an overlap between the scope of the Arbitration Clause and the scope of the Jurisdiction Clause. The issue before the court was therefore whether the Arbitration Clause or the Jurisdiction Clause applied to the dispute.

4.14 In dismissing the defendant's application to stay the proceedings, the court reiterated certain legal principles: citing *Fiona Trust & Holding Corp v Privalov*[8] and *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA*,[9] the court confirmed that it was well settled that courts would take a generous approach in construing arbitration clauses based on the presumed intentions of the parties as rational commercial parties.

4.15 However, the court also noted there was no reason to apply such an approach in cases where the arbitration clause may be expressed to apply to *all* disputes whilst the jurisdiction clause is expressed to apply to a certain *specific* dispute. In such cases, courts such as the one in *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp*[10] have resolved the apparent inconsistency by interpreting the jurisdiction

7 *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2021] 3 SLR 1422 at [18].
8 [2007] 2 Lloyd's Rep 267.
9 [2016] 5 SLR 455.
10 [2010] 2 SLR 821.

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clause as having carved out the specific disputes from the scope of the arbitration clause.

4.16 The learned judge held that the parties' intention, objectively ascertained, was for the Jurisdiction Clause to carve out disputes regarding the interpretation or application of the Policy from the scope of the Arbitration Clause. Pertinently, the Jurisdiction Clause was narrower than the Arbitration Clause; the renewal certificate confirmed that the parties' intention for disputes relating to the interpretation of the Policy was to be resolved through court proceedings; and it made commercial sense because this could be efficaciously and efficiently dealt with through the originating summons procedure.

4.17 On its face, the court's approach is not new and reinforces the proposition that where it is possible to reconcile the apparent conflicts such as carving out certain matters to fall within the court jurisdiction clause and other matters under the mediation or arbitration provisions, each would be given effect. There is, however, some degree of artificiality in how the court construed the objective parties' intention, in that the jurisdiction clause carved out matters requiring the "interpretation and application of the Policy" be determined by the court even though such issues would fall within the wider scope of "any dispute arising out of or in connection with this contract" in the arbitration clause. This decision could suggest that in the current challenging COVID-19 pandemic situation, Singapore courts may well be more accommodating to play a role in deciding issues relating to COVID-19 matters. Ultimately, the *Silverlink*[11] decision provides some interim guide as to how and the extent to which courts will determine the appropriate forum; it also provides guidance to many insureds looking to make claims under their business interruption policies.

4.18 This issue of a contract containing both an arbitration agreement and jurisdictional clause also arose in *BXH v BXI*,[12] which was an appeal from an unsuccessful application to set aside an award under Art 34(2)(a)(iii) of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law of International Commercial Arbitration[13] ("Model Law"). The distributor agreement in this case contained a detailed arbitration agreement and a jurisdiction clause which simply provided for the applicability of Singapore law and Singapore courts. The Court of Appeal, in giving effect to the arbitration agreement,

11 See para 4.13 above.
12 [2020] 1 SLR 1043.
13 UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

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endorsed the High Court's approach to reconcile the arbitration and jurisdiction clauses, reading the jurisdiction clause as "a submission to the Singapore court's supervisory jurisdiction over the arbitration"[14] and nothing more. The court held that where parties evince a real intention to have matters resolved by arbitration, a generous and harmonious interpretation should be given to the purportedly conflicting clauses such as to give effect to that intention.

II. Interim measure in support of arbitration

A. Anti-suit injunctions

4.19 The question of whether an anti-suit injunction could be granted against a party who commenced court proceedings contrary to the arbitration agreement as a "safety net" to protect against possible defects in the commencement of arbitration arose for consideration in *CCH v CDB*,[15] where, notwithstanding the arbitration agreements, the defendants commenced foreign proceedings and filed a suit in Singapore within a day of filing their notice of arbitration. The plaintiffs then commenced a separate action seeking an anti-suit injunction against the defendants and an order that the defendants discontinue the court proceedings wherever commenced. The defendants argued that they had commenced simultaneous court proceedings as a safety net against anything they may have failed to do in relation to properly commencing arbitration within the limitation period. The defendants also submitted that if the anti-suit injunction were to be granted, it should only be prohibitory (that is, a stay) and not mandatory (that is, a discontinuance) in nature.

4.20 Andre Maniam JC granted the anti-suit injunction and ordered the defendants to discontinue the court proceedings they had commenced. The court rejected the defendants' "safety net" argument and stated that if a party commences arbitration proceedings outside the limitation period, or commences proceedings, but in a defective manner, it cannot use that as a basis for going to court. This would not be a ground to resist a stay of proceedings under s 6 of the IAA, nor would it be a ground to resist an anti-suit injunction. In restating the position in the Court of Appeal case of *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd*[16] that "[i]n cases involving an arbitration agreement … it would suffice to show that there was a breach of such an agreement, and anti-

14 *BXH v BXI* [2020] 1 SLR 1043 at [55].
15 [2020] 5 SLR 798.
16 [2019] 1 SLR 732.

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suit relief would ordinarily be granted unless there are strong reasons not to",[17] the court held that the arbitration agreement was breached and there was no reason not to grant anti-suit relief.

4.21 Concerning the nature of an anti-suit injunction, the court accepted that certain situations might call for a stay, while in others, discontinuance would be more appropriate. In the present case, it was appropriate to order discontinuance of proceedings because (a) keeping the court proceedings afoot would serve no legitimate purpose as there was no scenario which the defendants would legitimately be pursuing their claims in court; (b) there would be no prejudice to the defendants; (c) it would cause the plaintiffs prejudice if the court proceedings were merely stayed as it would expose them to potential, unpredictable outcomes in the foreign proceedings which might yet continue to a hearing; and (d) the defendants themselves were prepared to discontinue (albeit only on terms).

4.22 The decision in *CCH v CDB* highlights that while protective court actions, such as interim measures from courts, are sometimes commenced by a party with the disclosure that arbitrations would be commenced in accordance with the arbitration agreements, commencing a court action to preserve a position (that in the case of procedural mishap a party could then return to court) was no justification to maintain the court action.

III. Setting aside of awards

4.23 Aside from the right to challenge a tribunal's decision on jurisdiction under s 10 of the IAA and Art 16 of the Model Law, a dissatisfied party could seek recourse to set aside the award under s 24 of the IAA and Art 34 of the Model Law. These grounds relate to challenging the existence or validity of the arbitration agreement, its scope, the procedure adopted in the arbitration, the composition of the tribunal, the arbitrability of the subject matter, and the overarching principles of public policy and natural justice.

A. Extending time to apply for setting aside

4.24 Article 34(3) of the Model Law provides that an application for setting aside "may not be made after three months have elapsed from the date on which the party making that application had received the award". If, however, a party seeks a correction or an interpretation of the award

17 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [68].

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under Art 33 of the Model Law, time would start to run only "from the date on which that request had been disposed of by the arbitral tribunal". In *BRS v BRQ*,[18] the Court of Appeal held that "a request had been made under Art 33"[19] meant that the substance (and not just the form) of the Art 33 request must come within the scope of the relevant Art 33 provision in order for the request to have the effect of extending the initial time limit under Art 34(3) of the Model Law. As the purported "corrections" the respondent sought were actually reviews of the tribunal's decision of substantive matters, this was not a "request" under Art 33 of the Model Law and hence the Court of Appeal found held that the three-month time limit under Art 34(3) of the Model Law was not extended and the respondent's setting aside application was time barred.

B. Assignor loses right to invoke arbitration

4.25 Only a party to an arbitration agreement has the right to commence and maintain an arbitration. An absolute assignment of a contract or a debt has the effect of assigning the concomitant right to arbitrate. This legal proposition was confirmed in the Court of Appeal decision in *BXH v BXI*,[20] where the court set aside a part of an award under Art 34(2)(a)(i) of the Model Law on the basis that BXI, although a party to the contract (containing the arbitration clause) had, at the time of the commencement of the arbitration, assigned its rights to a third-party factor. Although a reassignment was subsequently executed, it could not remedy the fact that at the time of commencement of the arbitration, there was no existing right for the claimant to do so. The Court of Appeal held that a dispute relating to the right to arbitrate a claim, when the right had been assigned, was one that concerned the existence of an arbitration agreement under Art 34(2)(a)(i) of the Model Law, and not one pertaining to the scope of an arbitration agreement under Art 34(2)(a)(iii) of the Model Law. It reasoned that "an arbitration agreement does not have a purpose or a life independent of the substantive obligations that it attaches to"[21] and hence the right to arbitrate is assigned together with the debt.

4.26 The court clarified that the principle of retrospective vesting of rights in the assignee was inapplicable in arbitration proceedings given that the basis of arbitration was one of parties' consent (unlike in court litigation, where the basis is founded on the State's coercive power) and an arbitral tribunal would not possess such a free-standing power to

18 [2021] 1 SLR 390. See paras 4.67–4.68 below.
19 *BRS v BRQ* [2021] 1 SLR 390 at [43].
20 See para 4.18 above.
21 *BXH v BXI* [2020] 1 SLR 1043 at [75].

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allow for the addition of new causes of action that are independent of the parties' arbitration agreement.

4.27 However, the court's reasoning in such situations should be understood only in relation to absolute assignments where the rights under the agreement have been fully assigned, as in a factoring or novation agreement, and may not extend to assignments which are intended merely as security contingent upon the occurrence of defaulting events, as in financing arrangements.

C. Refusal to admit evidence

4.28 A tribunal has wide powers to decide on the admissibility of evidence and ascertain its relevance, materiality and weight to be given. Decisions by the tribunal on admissibility are not one for which a court could intervene. Yet, at times a dissatisfied party may attempt to challenge an award on the basis that the failure to admit certain evidence amounts to a denial of the right to be heard and thus constitutes a breach of natural justice.

4.29 In *CDI v CDJ*,[22] the court reiterated that, similar to a case of setting-aside, resisting enforcement of an award on the grounds of breach of natural justice has a very high threshold and that the court's approach was "undergirded by the overarching principles of limited curial intervention and recognition of the autonomy of the arbitration process".[23]

4.30 The plaintiff, CDI, and the defendant, CDJ, entered into a memorandum of agreement ("MOA") for the sale and purchase of three vessels ("the vessels") under which the plaintiff was to pay the defendant a deposit of 10% of the purchase price of the vessels ("the Deposit"). The parties had the right to cancel the MOA and to retain the Deposit or to receive a full refund respectively upon the occurrence of various events as set out at cl 11 of the MOA, which permitted the plaintiff to receive a full refund if the defendant's agent ("CF") rejected or did not approve the grant of the loan facilities to complete the sale and purchase of the vessels. The loan was approved and accepted, but subsequently CF informed the plaintiff that it was no longer able to fund the purchase of the vessels. The plaintiff then sought a return of the Deposit on the basis that the grant of the loan facilities had been rejected or had not been approved. The defendant took the position that the plaintiff had failed to take delivery of the vessels. The MOA contained a reference to arbitration in Singapore

22 [2020] 5 SLR 484.
23 *CDI v CDJ* [2020] 5 SLR 484 at [30].

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under the Arbitration Rules of the Singapore Chamber of Maritime Arbitration[24] ("SCMA Rules"). Parties mutually agreed for the dispute to be determined by a sole arbitrator. The arbitrator ruled in all material aspects in favour of the plaintiff, ordering a refund. The defendant then applied to set aside the enforcement order.

4.31 The defendant's principal argument was that the arbitrator's decision to exclude evidence of pre-contractual negotiations without inviting parties to address on the admissibility of such evidence and had allowed cross-examination of his witnesses on pre-contractual negotiations. The court rejected these assertions and ruled that the arbitrator was entitled to decide on the admissibility of evidence without need to call for submissions. Given that the contract contained an "entire agreement" clause, such a question was clearly foreseeable.

D. Res judicata*, issue estoppel*

4.32 The doctrine of *res judicata* prevents a party from relitigating the same dispute which had earlier been disposed of in another set of proceedings. Such a doctrine also applies to and in arbitration. The fact that the earlier proceedings were commenced in the face of an arbitration agreement, in and of itself, would not constitute a violation of public policy if the opposing party chose not to contest the jurisdiction or take steps to prevent it from continuing. Such a situation was illustrated in the Court of Appeal decision in *BTN v BTP*.[25] The case concerned a sale and acquisition of shares in a private company in Malaysia ("the Company") under which each of the sellers remained to manage the Company under a promoter employment agreement ("PEA") with the Company, the terms of which were annexed to the share purchase agreement ("SPA"). Both the SPA and PEAs contained materially identical provisions as to the sellers' "With Cause" and "Without Cause" termination of employment. The effect of these would be that if the sellers' employment, as employees, were to be terminated "Without Cause", they would be entitled to the further earned consideration and if they were terminated "With Cause" the earned consideration would no longer be payable.

4.33 The SPA and PEAs contained SIAC arbitration clauses and designated the place of arbitration as Singapore. On 8 January 2014, the employees were dismissed summarily pursuant to the "With Cause" provision of the PEAs, citing the Company's failure to achieve the earnings, failure to properly manage the Company's cash flows, misrepresentation, and the taking of excessive, abrupt and/or inappropriately timed holidays

24 3rd Ed, October 2015.
25 [2021] 1 SLR 276.

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or leave. The employees challenged their dismissals and commenced proceedings under s 20 of the Malaysian Industrial Relations Act 1967,[26] which required parties to attend a mandatory conciliation at which no resolution was reached. The matter was then referred to the Malaysian Industrial Court ("MIC") which is empowered to do "all such things as are necessary or expedient for the expeditious determination of the matter".[27] The MIC adjourned the hearing multiple times and, despite notices having been sent to the Company, the Company did not participate in the MIC hearings. Eventually, the MIC ruled in favour of each of the sellers, holding that they had been dismissed "without just cause",[28] and it ordered the Company to pay compensation for lost salaries. The employees commenced proceedings to enforce payment and eventually, the Company made compensation as ordered in full. In July 2016, the employees commenced SIAC arbitration under the SPA, seeking the payment of the full purchase consideration. The parties, having settled a list of legal issues, asked the tribunal to decide, and the tribunal issued a partial award on these issues after a hearing spanning two days. In its partial award, the tribunal ruled that the MIC's finding that the employees were terminated without just cause or excuse was binding and conclusive for the purposes of termination "Without Cause" under the SPA and the PEAs, and that the buyers and the Company would be prevented from arguing that the employees were terminated "With Cause" by the doctrine of issue estoppel under Singapore law.

4.34 The Court of Appeal reaffirmed that the public policy ground for setting aside an award was narrow and reiterated the general principle in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*[29] that if an arbitral tribunal's findings of law and/or fact are wrong, such errors would not *per se* engage the public policy of Singapore. The court rejected the appellants' argument that recourse to the MIC was a breach of the arbitration agreement and thus against public policy. The court clarified that the mandatory nature of an arbitration clause was conditional on one party invoking it. Since it was not invoked by either of the appellants, the respondents' actions in bringing proceedings under the MIC could not be impugned. What this means is that when one is aware that the other party has, in breach of the arbitration agreement, commenced action (in whatever form other than the arbitration process as agreed), steps should be taken to prevent the continuation, whether by way of staying or restraining the action.

26 No 177 of 1967.
27 Industrial Relations Act 1967 (No 177 of 1967) (M'sia) s 29(g).
28 *BTN v BTP* [2021] 1 SLR 276 at [19].
29 [2007] 1 SLR(R) 597.

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4.35 The appellants further argued that, if an award which rests on errors of law by reason of which the tribunal was unable to exercise its mandate and determine the merits of either party's position, this should be contrary to public policy. The Court of Appeal rejected this argument, noting that the starting point was that errors or law and/or fact in arbitral decisions are final and binding on the parties. The court emphasised that a tribunal's decision on *res judicata* was not a decision on jurisdiction (which would have allowed the court to review it *de novo*), but rather one on admissibility. There was no good reason why erroneous decisions in respect of an admissibility issue (in this case, ascribing *res judicata* effect to a prior decision), should be treated any differently from other errors of law.

E. Awards providing for alternative relief

4.36 Awards should be complete and unambiguous, and the relief granted must be clear and certain. While these are desirable attributes and requirements to assist in the enforceability of the award, absent any other of the grounds set out in Art 34 of the Model Law, they do not, in and of themselves, constitute grounds for setting aside.

4.37 In *BYL v BYN*,[30] BYM ("the Company") was set up by BYL ("the Promoter") (collectively, "the plaintiffs") as a special purpose vehicle for the construction and operation of a development. Under the Share Subscription and Shareholders Agreement ("SSHA"), the defendant had two put options:

(a) Clause 14 of the SSHA stated that if the Promoter failed to undertake an initial public offering ("IPO") of the Company, the Promoter was obliged to buy the investor's shares in the Company at fair market value.

(b) Clause 17 of the SSHA also stated that upon other breaches of the SSHA, the Promoter was obliged to buy the investor's shares in the Company at a premium.

Clause 28.3 of the SSHA stated that cll 14 and 17 were independent and cumulative rights. Construction was delayed and the defendant commenced arbitration against the plaintiffs under the International Chamber of Commerce Arbitration Rules.[31]

4.38 The tribunal awarded to the defendants, as sought, granting the alternate reliefs (under both cll 14 and 17 of the SSHA) and the plaintiffs

30 [2020] 4 SLR 1.
31 1 March 2017.

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criticised the tribunal for having failed to decide the dispute before it in that it left it to the enforcement court to decide which of the two reliefs should prevail.

4.39 The judge found that there was nothing incomplete or lacking finality in the International Chamber of Commerce ("ICC") award. The tribunal had made a cumulative award, and the component amounts represented a pragmatic solution by the tribunal. Even if certain components were unenforceable, the other amounts would still remain enforceable.

4.40 A tribunal's duty is to make decisions on issues required of it and consider the proper relief or remedy that should follow. This case involves foreign investments in Indian enterprises which were subject to the laws of India, which arguably prohibits arrangements where foreign investors received guaranteed returns on their investments (Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations 1999 ("FEMA Regulations"). The arrangement described in this case appears to attract such an argument. It is for this reason and to ensure its enforcement in India that the tribunal crafted the relief in the manner it did. There is no question that a tribunal should craft its *dispositifs* clearly, and in a manner that would ensure its enforceability. The court quite properly upheld the award and rejected the interpretation given to it by the respondent seeking to set it aside.

4.41 The power of a tribunal to craft remedies and relief in alternatives had also been challenged in *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC*[32] which is the sequel to an earlier decision in *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC*[33] ("*Bloomberry* (*Partial Award*)") that previously dismissed the plaintiff's application to set aside an earlier award on liability.[34] Upon the issuance of the final award, the plaintiff then raised additional grounds for setting it aside. The tribunal had crafted the relief by (a) ordering the plaintiffs to pay the defendants damages, costs and interests; and (b) granting the defendants' further request that the plaintiffs buy the shares based on their value as of 9 December 2014, and directing that the plaintiffs take all steps necessary to enable the defendants to sell the shares, such as directing the plaintiffs' agent and controlling shareholder Prime Metroline Holdings Inc ("PMHI") to co-operate in the same.

32 [2020] SGHC 113.
33 [2021] 3 SLR 725.
34 See para 4.80 below.

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4.42 The plaintiff argued that the tribunal's order requiring it to purchase the shares from the defendant fell outside the scope of the submission to arbitration. Belinda Ang Saw Ean J rejected the argument, finding no excess of power on the part of the tribunal. The learned judge described the plaintiff's contention as one that had to do with the alleged erroneous exercise by the tribunal of an available power (that is, constituting a mere error of law, or even fact) as opposed to the tribunal's exercise of a power that it did not possess. Citing *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*,[35] the court emphasised that mere errors of law, or even fact, are not sufficient to warrant setting aside an arbitral award under Art 34(2)(a)(iii) of the Model Law. Additionally, the order did not bind or impose any obligation on a non-party PMHI to the arbitration. The order was directed at the plaintiffs to take all steps necessary to enable the defendants to sell the shares. The fact that PMHI may have to undertake certain actions was only incidental. In any case, the court noted that the tribunal's orders were made in the alternative in that the plaintiff was to "pay to [the respondent] the full value of the Shares",[36] and the second part of the remedy would only arise in consequence of the respondent's decision not to comply with the first part of the remedy. This could not give rise to acting in excess of its powers as the tribunal was crafting a remedy that would enable the defendant to get the value of the shares should the plaintiff continue to not co-operate to unblock their disposal by the defendant. The tribunal had the responsibility to craft remedies that are workable, which was what it did.

F. Non-disclosure by arbitrator of certain circumstances

4.43 The plaintiffs in *BYL v BYN*[37] also sought a determination that a tribunal member's ("SA") belated and partial disclosures of a co-counsel relationship with the defendant's solicitors gave rise to apparent bias which vitiated the ICC award. The learned judge applied the reasonable suspicion test which it said involved an objective assessment of whether there were circumstances which would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of the relevant facts that the tribunal may be biased and that a fair hearing may not be possible as a result. The court held that the plaintiff's nominated co-arbitrator SA's late disclosure of his engagement as co-counsel by the other party during the period prior to the issuance of the partial award in question, did not give rise to any reasonable suspicion of bias because

35 [2011] 4 SLR 305.
36 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2020] SGHC 113 at [6].
37 See para 4.37 above.

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he was acting as an independent barrister, and the representatives he met were not involved in the arbitration in question.

4.44 Interestingly, the court appeared to have accepted a standard of association strongly influenced by the practice at the English bar – that he was merely engaged as counsel and did not share in the law firms risks and profits, a view that is not known to be shared elsewhere. There is no good explanation why SA could not have disclosed his engagement or possible engagement when he was first approached. Prudence should have prompted him to seek the views of the co-arbitrators and the counsel before accepting the engagement while still serving as a member of the tribunal. It is no wonder that the ICC had to ask SA to decide if he wished to resign or have the ICC make the decision. Caution should be exercised by arbitrators who are also active legal practitioners. While disclosure alone does not cure any possible conflict, it gives the other party the opportunity to raise objections early. A failure to disclose deprives them of such opportunity and such failure should be enforced through appropriate sanctions.

G. *Breach of natural justice*

4.45 Arbitral tribunals have a duty to conduct the arbitration in accordance with the procedure agreed to by the parties and comply with the laws of the place of arbitration. A right to be heard is enshrined in Art 18 of the Model Law. Along with the increase in arbitration-related cases, the Singapore courts also saw a surge in applications to set aside awards, with 12 out of 15 decisions relating to setting aside containing alleged breaches of natural justice or due process. This could negatively impact the efficiency of international arbitration, undermine the significance of due process, and even erode the legitimacy of arbitration as a whole.

(1) Opportunity to be heard – "Attorney-eyes-only" documents

4.46 In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC*[38] Sundaresh Menon CJ addressed the concern of due process arguments being wielded cynically and improperly to attack the award and provided guidance to tribunals on how courts would strike a balance between the need to uphold parties' genuine due process rights and the tribunal's discretion and right to deal efficiently with the procedural details of the case.

38 [2020] 1 SLR 695.

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4.47 The parties, China Machine New Energy Corp ("CMNC") and Jaguar Energy Guatemala LLC ("Jaguar"), had entered into an engineering, procurement and construction contract ("the EPC Contract") in relation to the construction of a coal-fired power plant and a deferred payment scheme with secured notes. Disputes arose over CMNC's delays in the construction and over Jaguar's failure to perfect security of the notes issued. In January 2014, Jaguar terminated the EPC Contract and commenced arbitration against CMNC. The arbitration clause in the EPC Contract provided for an expedited procedure such that the tribunal's final award was to be issued 90 days after the selection of the third arbitrator or, if the majority of the arbitrators agreed, within a further 90 days.

4.48 During the arbitration, Jaguar was reluctant to disclose certain information due to CMNC's threatening actions against its personnel and their contractors, and it was concerned that CMNC would misuse that information to interfere with the construction project and/or the arbitration. In the circumstances, the tribunal made certain procedural orders, including an attorney-eyes-only ("AEO") regime. It was a twofold regime and CMNC could apply to see the protected documents under certain conditions. CMNC never did, and the tribunal eventually rendered an award in favour of Jaguar. The appellant applied to set aside the award, but it was dismissed and the appellant then appealed. At the appeal, the appellant relied on only one ground (as opposed to the three grounds in the High Court): that there was a breach of natural justice and due process because it had been deprived of a reasonable opportunity to be heard.

4.49 The Court of Appeal, after an analysis of the *travaux préparatoires* of the Model Law and various legal authorities, clarified that while Art 18 of the Model Law provides a right for each party to be given a "full" opportunity to present one's case, this right was not unlimited, but was impliedly limited by considerations of reasonableness and fairness. Hence, the overarching inquiry would be: Whether what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done? This is necessarily a fact-sensitive inquiry where the court would step into the shoes of the tribunal and regard would have to be given to the specific facts and circumstance of the case. The Court of Appeal highlighted two important points when undertaking this enquiry:

(a) The tribunal's conduct and decisions should only be assessed by reference to what was known to the tribunal at the material time. The fairness of the procedure can only be judged against what parties themselves may be taken as having agreed

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to and expect by what they contemporaneously communicated to the tribunal.

(b) The court would accord a margin of deference to the tribunal in matters of procedure, noting that the tribunal has a wide discretion to determine the arbitral procedure. The threshold for intervention is nevertheless a high one and the court will not intervene simply because it might have done things differently.

4.50 The Court of Appeal agreed with the High Court and held that the tribunal had justifiable basis for imposing the AEO regime; in any event, CMNC had suffered no prejudice from the imposition of the AEO regime. The court further held that Jaguar's rolling production of cost documents did not prejudice CMNC's right to present its case because CMNC never sought the production of the construction documents for the purpose of preparing its case, and CMNC's own filings in the arbitration suggested that CMNC had been able to value the completed work quantities with reasonable accuracy.

4.51 The Court of Appeal also espoused a general principle that if a party intends to contend that there has been a fatal failure in the process of the arbitration, then there must be fair intimation to the tribunal that the complaining party intends to take that point at the appropriate time if the tribunal insists on proceeding. This would take the form of the complaining party, at the very least, seeking to suspend the proceedings until the breach has been satisfactorily remedied. A party could not simply reserve its position until after the award and then take up the point. As such, if indeed CMNC had believed that proceeding with the hearing in July 2015 was impossible, it was incumbent on CMNC to bring home its concern to the tribunal. Not only was this not done, CMNC persisted in maintaining that it wished to press on with the July 2015 hearing.

4.52 Tribunals may sometimes be required to deal with documents containing "sensitive" information which a party may wish to protect, such as confidential price lists, tender quotations, competitors' lists, trade secrets, *etc*. The tribunal may, at times, impose limitations to such disclosure to protect such information, such as limiting sight of such information be limited to the other party's "attorneys only", and restraining the attorneys from releasing the same to their clients. While doing so has the effect of curtailing, to some degree, the other party's right to respond to the information, the Court of Appeal quite rightly considered that the AOE approach in this case was justified to prevent misuse of the sensitive information. This decision suggests that a balance must be reached between the right to be heard or to respond and the

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harm it could do to the other party should such information be released without restraint.

(2) Arbitrator insisted on proceeding on "documents-only"

4.53 It is a fundamental tenet of natural justice that a party must be given a fair opportunity to be heard. The court in *CBP v CBS*[39] explored the issue of witness gating and whether an arbitrator had the right to deny the plaintiff from calling and examining its witnesses under the SCMA Rules. The court ultimately found that the tribunal's refusal to hear all of a party's witness evidence was a breach of natural justice and set aside the award.

4.54 The parties in the arbitration could not agree on whether a physical hearing would be required, with one party wanting it and the other opposing. The arbitrator eventually decided that an oral hearing was necessary, but relied on rule 28.1 of the SCMA Rules to direct that there would be no examination of witnesses as the buyer had "failed to provide witness statements or any evidence of the substantive value of presenting witnesses".[40] The hearing proceeded without the calling of witnesses and the award found in favour of the bank.

4.55 Ang Cheng Hock J found that rule 28.1 of the SCMA Rules made clear where parties have not come to an agreement that the arbitration should only be on a documents-only basis, an oral hearing *must* be held. Further, rule 28.1 envisaged that parties must be allowed to call witnesses to give evidence if they wished. It is only where all parties have decided not to lead oral evidence or cross-examine any of the witnesses on their witness statements, that a hearing only for oral submissions can be held.

4.56 Specifically, with regard to witness gating, the learned judge observed that the SCMA Rules did not contain express witness gating provisions, and thus there was significant doubt as to whether the arbitrator even had any power to deny the calling of witnesses. The court also said that even if there was an implied authority to limit witness testimony on the grounds of efficiency, this power was not absolute, and had to be tempered with the tribunal's duty to afford the parties a fair opportunity to present their case. Unless there was a substantive basis to conclude that the witnesses sought to be presented were irrelevant or superfluous, such witnesses ought not be rejected on the basis of efficiency and costs.

39 [2020] SGHC 23.
40 *CBP v CBS* [2020] SGHC 23 at [40].

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4.57 *CBP v CBS* illustrates the desirability of arbitrations being administered, and arbitrators to play their role judiciously by conducting the arbitration in accordance with the procedure agreed. Unfortunately, at the current the moment, although the SCMA provides for rules of arbitration, it does not (unlike the SIAC) administer or supervise arbitrations thereunder. SCMA arbitrations proceed much like any *ad hoc* non-institutional arbitrations. Most shipping and maritime disputes referred to arbitration are conducted *ad hoc* much like English arbitrations. Some maritime practitioners even suggest that appeal against awards should be desirable, and a statutory exception should be made. The desire to develop a maritime dispute resolution hub cannot be anchored on past practices and historic links. With the advantage of location and emerging markets in Asia, perhaps it is way past due that Singapore's shipping arbitration must unshackle itself from its past in order to forge forward and develop its own distinctive.

(3) Choice of representation

4.58 It is trite that a party has a right to choose its representation in arbitration. A denial of the same could give rise to an assertion that the party so denied was unable to present its case, and thus also result in a denial of justice. This freedom of choice is reinforced in SIAC arbitrations by Rule 23.1 of the Arbitration Rules of the Singapore International Arbitration Centre,[41] which allow parties to choose to be represented by both legal counsel and non-legally qualified party representatives. However, this right to representation is not unlimited. In *CGS v CGT*,[42] the claimant commenced arbitration but subsequently discharged its legal counsel and the claimant's general manager served as its party representative. After a case management conference, the tribunal issued Procedural Order No 1 which provided, at para 6, that "[w]here a party is represented by Counsel, communications with the tribunal shall be with Counsel instead of the Party's representatives".[43] Subsequently, the claimant instructed a new legal counsel, T, for the hearing. The claimant sought to set aside the award asserting a breach of natural justice in that procedural order resulted in its general manager being omitted from certain e-mail communications in the days leading up to the hearing and that he was prevented from acting as co-counsel alongside T at the hearing.

4.59 In dismissing the claimant's setting aside application, Andre Maniam JC stressed that whilst the right to representation was important,

41 6th Ed, 1 August 2016.
42 [2021] 3 SLR 672.
43 *CGS v CGT* [2021] 3 SLR 672 at [7].

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it was not absolute. A tribunal's decision to proceed with a hearing in the absence of a party's first choice of counsel will not necessarily infringe on a party's right to representation, nor will it necessarily amount to a breach of natural justice. The inquiry of whether there was a breach of natural justice turns on whether the party was thereby deprived of a fair or reasonable opportunity to present his case.

4.60 The court found that the arbitrator did not infringe on the claimant's right to representation because it was reasonable for the tribunal to direct that there only be one line of communication between each party and the tribunal, especially in an expedited arbitration. Additionally, the claimant had not objected to the procedural order, and its general manager was subsequently omitted from e-mails. In any event, its general manager was permitted to, and did speak during the opening statement. In the premises, there was no breach of procedure and the tribunal's conduct fell within the range of what a reasonable and fair-minded tribunal in those circumstances would have done.

(4) High threshold expected to show breach of natural justice

4.61 Consistent with prior judicial authority, the Singapore courts maintain their pro-arbitration stance in setting a very high threshold before finding any breach of natural justice or conflict with Singapore's public policy.

4.62 In *CDX v CDZ*,[44] Vinodh Coomaraswamy J took the opportunity to set out a list of propositions which would not constitute a breach of natural justice:[45]

> (a) "for a tribunal to fail to refer every issue which it incorporates as a link in its chain of reasoning to the parties for submission";
>
> (b) for a tribunal to adopt an issue as a link in its chain of reasoning even if the parties:
>
> > (i) "did not plead or include that issue in a formal list of issues, provided that the issue surfaced in the course of the arbitration and was known to all the parties"; or
> >
> > (ii) "did not raise or contemplate that issue, provided that the issue is reasonably connected to the issues which the parties did raise and contemplate and

44 [2020] SGHC 257.
45 *CDX v CDZ* [2020] SGHC 257 at [34].

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if the party aggrieved had a reasonable opportunity to address all of 'the essential building blocks' for the tribunal's conclusion on that issue";

(c) "for a tribunal's chain of reasoning to adopt a middle path between diametrically opposed positions taken by the parties, so long as the building blocks for that middle path were before the tribunal, even if the tribunal did not give the parties notice that it might adopt that middle path";

(d) "if a party was deprived of a reasonable opportunity to present its case by its own conduct and not by any conduct of the tribunal";

(e) "if a party fails to present evidence or submissions to a tribunal on an issue which is a link in the tribunal's chain of reasoning, either because the party fails to appreciate that the issue is before the tribunal through mistake or misunderstanding or because the party makes a conscious tactical choice not to engage the opposing party on that issue"; and

(f) "for a tribunal simply to make an error in its award".

4.63 *CEB v CEC*[46] concerned a sale of goods dispute, where the arbitrator having listed the plaintiff's claim for consequential loss in the written awards made no finding on the claim. This, according to the applicant, resulted in significantly reducing the sums due to it. While Simon Thorley IJ was satisfied the applicant's rights had been prejudiced by the breach, the court exercised its discretion not to set aside the award, ruling that the applicant could have sought for an "additional award" for "claims presented in the arbitral proceedings but omitted from the arbitral award".[47] In any event, the court found that claim for consequential loss was a minute fraction of its overall claim (0.3% and 0.6% of each claim) and as such "it would be wholly disproportionate to remit the matter back to the arbitrator, much less set aside the awards".[48]

4.64 Where an issue is not placed before the tribunal for determination, no argument could thereafter be made that the tribunal's failure to decide it amounts to a breach of natural justice. In *BBA v BAZ*,[49] the majority members of the tribunal had found the appellants jointly and severally liable in substantial damages for fraudulent misrepresentation. Each of the appellants in *BBA v BAZ* were former shareholders who had sold

46 [2020] 4 SLR 183.
47 *CEB v CEC* [2020] 4 SLR 183 at [59].
48 *CEB v CEC* [2020] 4 SLR 183 at [64].
49 [2020] 2 SLR 453.

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their shares in the company to the defendants. They were represented in the arbitration by the same counsel and put forth a united defence. The Court of Appeal rejected the plea that there was no breach of natural justice, pointing out that the appellants had not taken the issue of joint and several liability before the tribunal, and as such, the tribunal could not be faulted for not foreseeing any complications and not dealing with this issue in the award. The court held that the onus was on the appellants, as sellers, to highlight the issue in the terms of reference or the pleadings but it did not do so. They had chosen to run their case without arguing liability apportionment and it was too late to bring this argument before the seat court in setting aside proceedings.

4.65 These cases illustrate that attempts to raise breaches of natural justice, although often made, rarely attain the high threshold expected of the applicant seeking to set aside the award.

(5) Remission as alternative to setting aside

4.66 A tribunal has a duty to consider all issues and make a complete award. Failing to do so is arguably a failure to afford the parties a reasonable opportunity to be heard or 'otherwise unable to present its case' under Art 34(2)(a)(ii) of the Model Law and constitutes a denial of natural justice under s 24 of the IAA. Where grounds under Art 34(2) of the Model Law are found, the court may aside the award but retains the discretion to enforce the award notwithstanding the failure, or, remit the award to the tribunal under Art 34(4) of the Model Law, for consideration to take such step to eliminate the grounds for setting aside.

4.67 In *BRS v BRQ*,[50] the Court of Appeal overturned an award and remitted an issue to the tribunal for further consideration after finding that the tribunal's failure to consider the claimants' evidence and submissions was in breach of natural justice.

4.68 BRS ("the Seller") undertook to build a hydroelectric power plant ("the Project") via a special purpose vehicle, BRR ("the SPV"). While the Project was underway, the SPV ran out of funds, and BRQ ("the Buyer") entered as an investor to inject fresh funds into the Project. Under an SPA, the Buyer contracted to buy all the shares in the SPV. In the SPA, it was envisaged that the Project would be completed or, "wet commissioned",[51] by 31 March 2013; and further, that the Project cost would be about S$170m ("the Project Cost"). However, the Project ended up achieving wet commissioning more than two years later, on 31 October 2015. As

50 See para 4.24 above.
51 *BRS v BRQ* [2021] 1 SLR 390 at [1].

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a result of the Project delays, and as the costs of the Project exceeded the Project Cost, the Buyer and the SPV (collectively, "the claimants") initiated arbitration proceedings against the Seller, claiming payment for the additional costs above the Project Cost and damages that were incurred due to the delay in completion.

4.69 The claimants brought proceedings against the Seller under the arbitration agreement in cl 14 of the SPA. The tribunal found largely in the claimants' favour concerning issues of liability. However, it limited the Seller's liability with respect to certain time-dependent components to 30 June 2014 ("the Cut-off Date"). In the tribunal's view, the Project could have achieved wet commissioning on the Cut-off Date (rather than the eventual date of 31 October 2015) if the claimants had undertaken the construction and commissioning of the Project in the most prudent and cost-effective manner. Both the claimants and Seller were dissatisfied with various aspects of the award, and they applied to set aside portions of the award.

4.70 In dealing with the claimant's appeal, the Court of Appeal reaffirmed the high threshold required to challenge an award on the grounds of breach of natural justice. The court also confirmed that where the tribunal had failed to consider evidence and/or submissions raised by a party, this can be a ground to set aside the award. The court ruled that the tribunal had failed to consider the claimants' evidence and submissions relating to the transmission line defects being a separate cause of the delay in achieving wet commissioning, which affected the quantum of indemnity payable by the respondent. However, the court found this situation to fall squarely within the factual scenarios in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd*[52] and *AKN v ALC*[53] where the respective tribunals had similarly failed entirely to consider an important pleaded issue raised by the parties. As such, the court held this to be a breach of natural justice and remitted the issue on transmission line delays to the tribunal.

H. Award contrary to public policy

4.71 Awards that are considered contrary to public policy are liable to be set aside. Public policy may only be engaged if the most fundamental notions of justice are violated which would "shock the conscience of the court". Allegations that certain decisions made by the tribunal or actions of a party infringed laws of another jurisdiction would sometimes be

52 [2010] SGHC 80.
53 [2015] 3 SLR 488.

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attempted by counsel to sustain the ground that the award made was contrary to public policy. Such attempts are often futile.

4.72 In *CBX v CBZ*,[54] the court refused an application to set aside an award despite finding that the tribunal had erred in law and that one of the orders granted contravened Thai mandatory law.

4.73 The dispute arose out of an SPA. The governing law of the SPA was Thai law with arbitration under the ICC Arbitration Rules seated in Singapore. Failing to receive payments of instalments under the SPA, arbitration was commenced. The tribunal ultimately found in favour of the defendants and ordered the plaintiffs to pay the full purchase price and compound interest. The parties' experts had agreed that Thai law did not allow interest payable under the SPA to be compounded, but the tribunal had failed to appreciate the degree to which this was agreed by the experts. When requested for a correction, the tribunal declined to do so. The plaintiffs sought to set aside the award on the basis that the tribunal exceeded its jurisdiction, failed to afford the purchasers a reasonable opportunity to present their case and contravened Singapore public policy.

4.74 The judge dismissed all the grounds of setting aside in *CBX v CBZ*, holding that the tribunal did not exceed its jurisdiction by awarding compound interest, as s 12 of the IAA expressly provided that the arbitral tribunal may award compound interest. The tribunal's task was to determine the effect of Thai law on the SPA and exercise its power under the IAA in line with this determination. However, due to the tribunal's mistake as to the parties' position and its misunderstanding of Thai law, it wrongly exercised its power. Nevertheless, the court viewed this as a situation of an erroneous exercise of power rather than the exercise of a power the tribunal did not have and hence was not a ground for setting aside. In the absence of obvious criminality, such action should not normally warrant intervention. To do so would be tantamount to re-opening and rehearing the merits of an arbitration.

4.75 In yet another case involving the application of FEMA regulations of India,[55] *Gokul Patnaik v Nine Rivers Capital Ltd*,[56] the applicant sought to set aside the award on the basis that the tribunal had made it in excess of jurisdiction and that the award violated Indian law and hence was contrary to the public policy of Singapore. The dispute arose out of a SSHA in 2010 under which the respondent ("Nine Rivers") was to purchase

54 [2020] 5 SLR 184.
55 See also *BYL v BYN* [2020] 4 SLR 1 at paras 4.37–4.40 above.
56 [2021] 3 SLR 22.

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securities in Global Agrisystem Pte Ltd (a company incorporated in India). By another agreement that was entered into between Katra Finance Ltd ("Katra Finance") and the respondent, Katra Finance agreed that it would, should certain events occur under the SSHA, repurchase the securities owned by Nine Rivers for a sum of INR 302,500,000 ("the 2014 SPA"). The 2014 SPA provided for SIAC arbitration seated in Singapore, with the governing law being Indian law. The respondent exercised its rights under the 2014 SPA. When the purchase of the securities was not completed in accordance with the 2014 SPA, the respondent, pursuant to s 17.2.2.1 of the SSHA, called upon the claimant and Katra Finance to purchase the securities for INR 1,329,000,000 ("Investor Put Option"). The claimant and Katra Finance did not respond to the put option. The respondent commenced the arbitration pursuant to the arbitration agreement in the 2014 SPA. The arbitrator eventually held in favour of the respondent and ordered the claimant to purchase the securities pursuant to the Investor Put Option.

4.76 In its application to set aside the award, the claimant argued that the finding of liability under the SSHA was not a dispute arising under the 2014 SPA. Vivian Ramsey IJ rejected the argument and agreed with the arbitrator's findings that the arbitration agreement in the 2014 SPA was drawn widely to cover disputes arising "out of or in relation to or in connection with the interpretation or implementation of"[57] the 2014 SPA which would extend to the Investor Put Option contained in the 2010 SSHA as it was the subsequent breach of the 2014 SPA that triggered the right to exercise it as expressly preserved under the SSHA.

4.77 As to the submission that the SSHA and 2014 SPA breached Indian law (FEMA Regulations) and that there was a breach of international comity (and thus, Singapore public policy), the court ruled the arbitrator's findings that the SSHA and the 2014 SPA were not contrary to Indian law as they were findings of fact and, absent vitiating factors such as fraud or breach of natural justice, could not be reopened in the court. In any event, the court stated that even if it was open to the court to consider the issue of Indian law afresh, it would not do so because the public policy of sustaining international awards on the facts of the current case outweighed the public policy in discouraging international commercial transactions which breach a country's foreign exchange regulations. It observed that a mere regulatory infringement would not meet the threshold that the illegality was so egregious as to "shock the conscience"[58] of the court.

57 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [80].
58 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [206].

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4.78 It is important to note that while fraud, breach of natural justice or other egregious acts or omission which lead to the decision or decision-making process could taint the award, not every case of illegality in the underlying contract or the transaction would engage public policy.

IV. Enforcement of award made in Singapore

A. Post-award admission of evidence

4.79 Awards, whether made in Singapore or elsewhere, not otherwise set aside may be enforced and have the same effect as judgments and orders of the High Court. Applications for enforcement of awards made in Singapore are almost always met with a cross-application for setting aside. In practice, such applications are heard at the same time. Where setting aside fails, the award would be granted enforcement. The grounds for refusal of enforcement and setting aside are similar for awards made in Singapore.

4.80 An attempt to resist enforcement of an award on the basis of new evidence was made in *Bloomberry* (*Partial Award*).[59] The case arose from a management services agreement ("MSA") entered into between the parties relating to the Solaire Resort & Casino ("Solaire") a gaming resort located in Manila, Philippines. The MSA provided for Singapore arbitration under the UNCITRAL Arbitration Rules 2010. Allegations of fraud were raised in the arbitration. By its partial award (liability), the tribunal found, *inter alia*, that there were no misrepresentations by the defendants that induced the plaintiffs to enter into the MSA and that to justify rescission of the MSA by the defendant on account of causal fraud under Philippine law, the fraud must be serious and must have operated at the time of the making of the MSA. The plaintiffs were thus held liable for wrongful termination. In seeking to set aside and resisting enforcement of the partial award, the plaintiffs asserted that the partial award was affected by fraud and that that it would be contrary to Singapore public policy to permit enforcement of the partial award in this jurisdiction. In support of that assertion, the plaintiffs tendered "new evidence" in the form of: (a) the Non-Prosecution Agreement between the US Department of Justice ("DOJ") and Las Vegas Sands ("LVS") ("the DOJ Agreement"); and (b) the 7 April 2016 Order by the US Securities and Exchange Commission ("SEC") instituting cease-and-desist proceedings against LVS ("the SEC Order"). As these were papers arising out of investigation for possible violations of the US Foreign Corrupt Practices Act,[60] they

59 See para 4.41 above.
60 15 USC (US) §§ 78dd-1 *et seq* (1977).

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were collectively described as the "FCPA Findings". The plaintiffs averred that the FCPA Findings were not discoverable until a few months after the partial award was made. These papers indicated the involvement of the defendants' principals, (Weidner and Chiu), which took place between 2006 and 2011, before the parties entered into the MSA.

4.81 As a preliminary issue, Belinda Ang Saw Ean J noted that while the application was filed out of time, O 3 R 4(1) of the Rules of Court gives the court discretion on "such terms as it thinks just" to grant time extension in order to achieve justice in the circumstances of the case. The judge granted the extension on the basis that the FCPA Findings was discovered post-award.

4.82 While the court readily accepted the FCPA Findings as new evidence, the court found that they were insufficient to show a strong, cogent evidence of fraud. There was no evidence of dishonest concealment by the defendants, nor was there anything disclosed which evinced a subjective intention to defraud on the part of the defendants. Additionally, the FCPA Findings did not constitute material information that would substantially impact the making of the partial award or information so material that earlier discovery of it would have prompted the tribunal to rule in favour of the plaintiffs. Pertinently, the FCPA Findings only alleged violations of accounting provisions and not anti-bribery provisions, and it never stated that there was any direct involvement of bribery on the defendant's part.

4.83 Another decision where post-award evidence fraud was asserted as a ground to resist the enforcement of the award came before Vinodh Coomaraswamy J in *Vitol Asia Pte Ltd v Machlogic Singapore Pte Ltd*[61] ("*Vitol*"). The applicant in *Vitol* was introduced by a mutual acquaintance to one Saiful, who described himself as the respondent's "Field Sales Manager". Saiful purportedly entered into a contract with the applicant for the sale of a substantial cargo of gas oil. The arbitrator proceeded on a "document-only" arbitration and held the contract to be valid and binding on the respondent, thus rejecting the assertion that Saiful lacked authority to bind the respondent. In support of its application to resist the enforcement of the award, the respondent sought the admission of WeChat messages (between Saiful and the respondent's director Choo), a police report filed by Choo about Saiful's "commercial tactics", and an affidavit from Saiful in support of the respondent's assertion.

61 [2020] SGHC 209.

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4.84 Like Ang J in the *Bloomberry* (*Partial Award*),[62] the learned judge accepted the new evidence, except that he did so more readily, taking a position that he was unconstrained by the *Ladd v Marshall*[63] test (adopted by Edmund Leow JC in *Government of the Lao People's Democratic Republic v Sanum Investments Ltd*[64] and undisturbed by the Court of Appeal)[65] and was free to receive or reject evidence. In his eventual finding, however, the court found that no fraud was established and rejected the challenge.

4.85 The learned judge in his decision also made several observations on what constituted an effective arbitration agreement in response to the respondent's challenge that there was no arbitration agreement within the meaning of s 2A(1) of the IAA. He took the view that s 2A(6) of the IAA operated as a statutory estoppel provision to deem effective an agreement to arbitrate if the respondent failed to specifically deny the claimant's assertion of the existence of an arbitration agreement. In this regard, the court observed that the respondent had the opportunity to deny the existence of an arbitration agreement, at least once when formally notified by the Notice of Action, and then when requested by SIAC to appoint the arbitrator. In the judge's view, a general denial of the existence of the contract would not suffice. He went further to state "any fraud or corruption in the formation of the parties' contract is incapable of having any effect on the operation of the arbitration agreement which is deemed effective by s 2A(6) of the Act".[66]

4.86 While the court's views may appear to be supportive of arbitration, there is perhaps some wisdom to query if such a strict imposition is appropriate, given that an unrepresented respondent should not be expected to know the effect of s 2(A)(6) of the IAA, the doctrine of separability, and the fact that independent of whether a contract existed, it is bound to participate in an arbitration which it unwittingly got enmeshed with. If this is the case, the underlying principle of consent being the foundation of any arbitration needs perhaps to be redefined.

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62 See para 4.41 above.
63 [1954] 1 WLR 1489.
64 [2015] 2 SLR 322.
65 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [17] and [28].
66 *Vitol Asia Pte Ltd v Machlogic Singapore Pte Ltd* [2020] SGHC 209 at [86].

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B. Tribunal's refusal to allow evidence of pre-contract negotiations

4.87 A tribunal has wide powers to decide on the admissibility of evidence and ascertain its relevance, materiality and weight to be given. A decision by the tribunal on admissibility is not one in which a court could intervene. Yet, at times an aggrieved party may attempt to challenge an award on the basis that the failure to admit certain evidence amounts to a denial of the right to be heard and thus constitutes a breach of natural justice.

4.88 In *CDI v CDJ*,[67] the court reiterated that, similar to a case of setting aside, resisting enforcement of an award on the grounds of breach of natural justice has a very high threshold and that the court's approach was "undergirded by the overarching principles of limited curial intervention and recognition of the autonomy of the arbitration process".[68]

4.89 The plaintiff, CDI, and the defendant, CDJ, entered into a memorandum of agreement ("MOA") for the sale and purchase of three vessels ("the vessels") under which the plaintiff was to pay to the defendant a deposit of 10% of the purchase price of the vessels ("Deposit"). The parties had the right to cancel the MOA and to retain the Deposit or to receive a full refund respectively upon the occurrence of various events as set out at cl 11 of the MOA, which permitted the plaintiff to receive a full refund if the defendant's agent ("CF") rejected or did not approve the grant of the loan facilities to complete the sale and purchase of the vessels. The loan was approved and accepted but subsequently, CF informed the plaintiff that it was no longer able to fund the purchase of the vessels. The plaintiff then sought a return of the Deposit on the basis that the grant of the loan facilities had been rejected or had not been approved. The defendant took the position that the plaintiff had failed to take delivery of the vessels. The MOA contained a reference to arbitration in Singapore under the SCMA Rules. Parties mutually agreed for the dispute to be determined by a sole arbitrator. The arbitrator ruled in all material aspects in favour of the plaintiff, ordering a refund. The defendant applied to set aside the enforcement order.

4.90 The defendant's principal argument was that the arbitrator's decision to exclude evidence of pre-contractual negotiations without inviting parties to address on admissibility of such evidence, and to allow cross-examination of his witnesses on pre-contractual negotiations,

67 See para 4.29 above.
68 *CDI v CDJ* [2020] 5 SLR 484 at [30].

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constituted a breach of natural justice. The court rejected these assertions and ruled that the arbitrator was entitled to decide on admissibility of evidence, without a need to call for submissions. Given that the contract contained an "entire agreement" clause, such a question was clearly foreseeable.

V. Confidentiality in international investment arbitrations

4.91 Confidentiality is one of the key attributes of arbitration. Both the IAA and the AA impose a general obligation on parties to an arbitration to keep the documents and proceedings in that arbitration confidential. Issues of breach of confidentiality in arbitration do not occur often, perhaps because there are uncertainties as to what, if at all, would be the proper sanctions for such a breach.

4.92 The case of *Republic of India v Vedanta Resources plc*[69] that came before the High Court required an examination of whether the general obligation of confidentiality in commercial arbitration also extended to investment treaty arbitration.

4.93 The plaintiff was the Republic of India, and the defendant was a company incorporated in the UK. In 2006, Cairn Group (a group of companies) restructured its Indian assets and, in 2011, sold one of its companies, Cairn India Limited (which held most of the Indian assets) to the defendant. The plaintiff's position was that this restructuring was a tax-abusive transaction and was subject to Indian capital gains tax. The Cairn Group and the defendant commenced arbitration separately against the plaintiff (the "Cairn Arbitration" and "Vedanta Arbitration", respectively). The Cairn Arbitration was seated in the Netherlands, while the Vedanta Arbitration was seated in Singapore. Both arbitrations arose from the same underlying transaction.

4.94 The tribunals in both arbitrations issued procedural orders permitting cross-disclosure of documents on a case-by-case approach, and indicated that a party seeking to make a cross-disclosure, when opposed, would have to seek leave of the tribunal. One difference between the two sets of arbitration related to who carried the burden on such an application. In the Cairn Arbitration's procedural order, the burden lay on the party opposing cross-disclosure, because cross-disclosure was the general rule. In the Vedanta Arbitration's procedural order, the burden was upon the party seeking cross-disclosure, because cross-disclosure was an exception to the general rule.

69 [2020] SGHC 208.

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4.95 In its application to the court, the plaintiff sought two declarations concerning Singapore arbitration law: (a) that the documents disclosed or generated in the Vedanta Arbitration were not "confidential and private"; and (b) that the plaintiff would not breach any obligation of confidentiality or privacy if it were to disclose, for the purposes of the Cairn Arbitration, any of the documents which had been disclosed or generated in the Vedanta Arbitration. The first declaration, if granted, would establish that Singapore arbitration law does not extend to investment treaty arbitration. The second would have the effect of creating an exception to the general obligation established on the first declaration.

4.96 The defendant raised a preliminary question to the plaintiff's application stating that the application was an abuse of process of the court or a collateral attack on a decision of the Vedanta tribunal because the Vedanta tribunal had already decided that the general obligation of confidentiality in Singapore arbitration extended to investment treaty arbitration.

4.97 Coomaraswamy J, in dealing with the preliminary question, made clear that a procedural order was meant to regulate how the tribunal would go about determining the party's legal obligations and were not final. The tribunal had the powers to reconsider and revise its earlier procedures and was not subject to review by the court. The learned judge also observed that there was judicial and academic consensus that investment treaty arbitration came within the meaning of "commercial" in Art 1(1) of the Model Law, citing in support the Court of Appeal decision in *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho*[70] which referred to Art 1(1) of the Model Law.

4.98 The judge, however, concluded that a declaration on confidentiality was not a matter governed by the IAA or Model Law and therefore a court was not prevented by Art 5 of the Model Law from so intervening. In the court's view, the plaintiff was merely seeking a decision on Singapore's substantive law on arbitration as any litigant could, based on the ordinary principles which apply to the exercise of the court's declaratory jurisdiction. The plaintiff had also undertaken to not act unilaterally to ignore the Vedanta tribunal's procedural orders. The mere fact that the relief restated a question which had been answered by a tribunal would not make the application in and of itself an abuse of process or collateral attack. Although the learned judge declined to make the declarations sought, he seized the opportunity to articulate his views on confidentiality in investment treaty arbitration. Notably, the learned judge thought the existing case authorities to be of little assistance,

70 [2019] 1 SLR 263.

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observing that the decision in *AAY v AAZ*[71] did not relate to arbitration under an investment treaty, and the decision of *Myanma Yaung Chi Oo Co Ltd v Win Win Nu*,[72] while arising under an investment treaty, had been deprecated by a subsequent key UK decision.[73] He opined that "[a] different approach might well be warranted for investment-treaty arbitration, given the different stakeholders and the sovereign and public interests implicated".[74] Coomaraswamy J had also suggested a tribunal in a Singapore-seated arbitration, when faced with ambiguity or a lacuna in that law, should be entitled and empowered to ascertain, develop and apply the principles of common law where that is necessary for it to resolve the dispute at hand. It would be for the Court of Appeal to consider if this is something the Singapore courts would be prepared to do.

4.99 There is indeed a need to re-examine whether a general duty of confidentiality should be extended to investment treaty arbitrations. This requires a reconsideration of the scope of the current arbitration legislation and perhaps the need for new legislation supportive of treaty-based claims, as opposed to the disputes which are commercial in nature. The current assumption that the use of the term "investments" in the footnote description of "commercial" to Art 1(1) of the Model Law is too simplistic an approach and ignores the fact the word "investments" as used in the text is descriptive of transactions entered into between parties which could give rise to a "commercial relationship". An investor who seeks to invoke its rights under an investment treaty is, at best, a third-party beneficiary under the treaty and could never be said to have a "commercial relationship" with the state party.

4.100 Singapore has developed and has the continuing capacity to develop jurisprudence in this space, without the need to be too conscious that it may not accord with English courts' decisions given that the English courts' arbitration jurisprudence is still in flux. The recent decision in *Halliburton v Chubb Bermuda Insurance Ltd*[75] is one such example, where the UK Supreme Court, while holding that the practice of arbitrators accepting repeat appointments from the same parties or in related cases (without any disclosure to the other party) is unacceptable, did not remove the appointee and went further to justify exceptions for cases in London maritime and commodities arbitration.

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71 [2011] 1 SLR 1093.

72 [2003] 2 SLR(R) 547.

73 *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 104.

74 *Republic of India v Vedanta Resources plc* [2020] SGHC 208 at [117].

75 [2020] UKSC 48.

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VI. Domestic arbitration under the Arbitration Act

A. Appeal against award in domestic arbitration under the Arbitration Act

4.101 Unlike an award made under the IAA, an award made in a domestic arbitration under the AA could be appealed against to the court on a question of law arising out of the award under s 49 of the AA. This has tempted lawyers to craft issues of fact, procedural issues and discretionary powers of the tribunal as questions of law in order to launch a review of the award. In *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd*,[76] the tribunal's award on the quantum of costs was sought to be set aside on the ground of "question of law". The ground asserted was that the plaintiff's offer of a sum more than the amount awarded by the award should have caused the tribunal to order costs to be borne by the defendant. In addressing the question of whether the tribunal necessarily had to penalise a party in costs, Ang Cheng Hock J noted that the question was merely whether and how the tribunal should exercise the discretion. This was not a question of law within the meaning of s 49(1) of the AA. The learned judge also noted that the plaintiff had attempted to frame several questions as "whether the tribunal had 'jurisdiction' to make certain findings of fact"[77] as attempts to circumvent the arbitrator's conclusive finding of fact. The appeal failed.

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76 [2020] SGHC 81.
77 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] SGHC 81 at [76].

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